UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT A. GRAY, ADMINISTRATOR, ET AL. Plaintiffs, v. JEFFREY DERDERIAN, ET AL., Defendants.	)	**HEARING REQUESTED** Civil Action No. 04-312-L

REPLY IN SUPPORT OF
MOTION TO DISMISS MASTER COMPLAINT
AGAINST ESSEX INSURANCE COMPANY

Pursuant to Amended General Order #2002-01, Essex Insurance Company ("Essex") replies as follows to Plaintiffs' Objection to Motion to Dismiss Master Complaint against Essex (hereinafter "Opposition," or "Opp. Br.").

Introduction

In their Opposition, Plaintiffs set out for the first time the facts and legal theory that underlie their single claim against Essex.[1] The Claim, it now appears, is based on an October 2002 inspection of The Station, conducted by a company known as Multi-State Inspections ("Multi-State"). Based on this single alleged inspection, Plaintiffs now argue that Essex "undertook" a broad duty to Plaintiffs to identify safety hazards on The Station premises; and became liable to Plaintiffs for a "voluntary undertaking" under Restatement (Second) of Torts

[1] The claim, which is not numbered, appears on pp. 118-120 of the Master Complaint, between Counts LVII and LVIII. It is referred to here as the "Claim."

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§ 324A(c) ("Section 324A").[2]

Plaintiffs' Claim against Essex fails, for at least two reasons. First, so far as Essex is aware, no Rhode Island case has ever held an insurer directly liable to an injured plaintiff for injuries caused by the insurer's allegedly negligent inspection of its insured's premises. To the contrary, so far as Essex is aware, each of the Rhode Island cases that have considered this issue are *opposed* to Plaintiffs' position. *See* pp. 3-6, below (discussing *McAleer v. Smith*, 791 F. Supp. 923, 934-35 (D.R.I. 1992); *Mustapha v. Liberty Mut. Ins. Co.*, 268 F. Supp. 890, 895 (D. R.I. 1967), *aff'd*, 387 F.2d 631 (1st Cir. 1967)).

Second, even if this Court were to accept Plaintiffs' novel theory of liability, Plaintiffs have failed to plead, and cannot credibly plead, the facts necessary to permit recovery on a "negligent inspection" claim against Essex. As Plaintiffs appear to concede, reliance is an essential element of liability for "negligent undertaking" under Section 324A(c). *See* Opp. Brf., p. 10 (*citing Dixon v. Royal Cab, Inc.*, 1988 WL 1045146 (R.I. Super. 1988)). Here, Plaintiffs have not pleaded, and cannot credibly plead, that the patrons who attended The Station on February 20, 2003, did so in reliance on any "undertaking" by Essex. *See* pp. 7-8, below.

Plaintiffs' response is to suggest that liability may be imposed, even if Plaintiffs were unaware of Essex's alleged "undertaking," so long as The Station's owner, *Mr. Derderian*, relied on the Essex inspection to reveal safety hazards. That argument also fails, because Plaintiffs have no basis to plead that Mr. Derderian did in fact rely (or reasonably could have relied) on the October 2002 report. *See* pp. 8-9, below. In any case, such an assertion would run contrary to the conditions set forth in the Essex Policy ("Essex Policy Conditions"), which state

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[2] In addition to Essex and Multi-State, the Claim in Plaintiffs' Master Complaint also mentions a third defendant – High Caliber Inspections – and two earlier inspections – on April 4, 1996 and March 25, 1998. These are nowhere mentioned in the Opposition. It appears that Plaintiffs no longer intend to argue that High Caliber was an "agent or servant" of Essex, or that the two earlier inspections were carried out on Essex's behalf.

unequivocally (1) that any inspections or surveys conducted by Essex "relate *only* to insurability and the premiums to be charged;" (2) that Essex "do[es] not make safety inspections;" and (3) that Essex "*do[es] not undertake to perform the duty of any person or organization to provide for the health and safety of ... the public.*" *See* Essex Policy Conditions (attached as Exhibit 1 to Mot. to Dismiss) (emphasis supplied).

Argument

I. Plaintiffs' Claim For "Negligent Inspection" Is Inconsistent With Rhode Island Law And Public Policy.

To Essex's knowledge, no court in Rhode Island ever has held an insurer directly liable to an injured plaintiff for injuries caused by the insurer's allegedly negligent inspection of the insured's premises. In fact, on the relatively few occasions when Rhode Island courts have had occasion to consider claims against insurers based on their allegedly negligent inspections, the courts resoundingly have rejected such claims.

For example, in *McAleer v. Smith*, 791 F. Supp. at 935, this Court considered a claim involving negligent inspection of a seagoing vessel, the S/V MARQUES, by an insurance underwriter, the Yachtsman Syndicate ("Yachtsman"), allegedly acting as an agent of Lloyds of London ("Lloyds"). Following the inspection, the vessel foundered in high seas. Nineteen persons drowned, including a sixteen-month-old infant. *See McAleer v. Smith*, 860 F. Supp. 924, 926 (D.R.I. 1994) (*"McAleer II"*).

The Court granted summary judgment to Lloyds on Plaintiffs' "negligent inspection" claim. *See* 791 F.Supp at 923, 925. It found, first, that Lloyds was not vicariously liable for Yachtsman's alleged negligence, because Yachtsman, at the time of the alleged inspection, was not acting as an "agent" of Lloyds. *Id.* at 934. Moreover, it held, "even if this Court were to find that actual or apparent authority existed [so as to make Yachtsman an agent of Lloyds],

Yachtsman's alleged failure to properly inspect the vessel did not amount to a breach of duty that ran to plaintiffs or their decedents." 791 F. Supp. at 934-35. Though it acknowledged the tragic circumstances of the case, the Court rightly resisted plaintiffs' attempt to exploit that tragedy by imposing on insurers a new, and wholly unjustified, theory of third-party liability.

Likewise, in *Mustapha v. Liberty Mut. Ins. Co.,* 268 F. Supp. at 891, the plaintiff, who had been injured at her workplace, attempted to sue her employer's workers' compensation insurer directly, as a third-party tortfeasor. The plaintiff's theory – remarkably similar to the one now articulated in Plaintiffs' Opposition – was that the insurer had "conducted periodic safety inspections of the [employer's] machinery and plant"; that the insurer "'had a duty based upon an undertaking"; and that it "negligently failed to perform this duty causing the plaintiff to be injured." 268 F. Supp. at 892.

The Court rejected Plaintiff's claim, and ruled that the insurer was entitled to immunity under the Rhode Island workers' compensation statute. Quoting the "well-reasoned" decision in *Kotarski v. Aetna Cas. & Surety Co.*, 244 F. Supp. 547, 558 (D. Mich. 1965), the court observed:

> If an insurance company can escape tort liability ... by not making any inspections on the premises of the insured, but may incur unlimited tort liability by making some inspections, it more than likely will decline to make any. . . The ultimate losers will be workmen and their families. . . If insurers are to be held liable in tort, as well as for workmen's compensation, every time such an inspection fails to reveal a preventable accident, it would be in effect strict liability. Such additional liability should be imposed only by the legislature and not by the court.

Id. at 894 (internal citations omitted).[3] Similarly, a finding of tort liability in this case would

[3] Plaintiffs point out, correctly, that *Mustapha* is a workers' compensation case. The plaintiff in *Mustapha* tried to sue a third party because the Rhode Island workers compensation statute barred her from obtaining full recovery from her employer. The Plaintiffs in this case are trying to sue third parties because they fear that the principal defendants may not have sufficient assets, or insurance coverage, to satisfy a judgment. Nonetheless, the same considerations apply. Whatever Plaintiffs' motivation for seeking it, an expanded system of tort liability, in

require Essex to serve as indemnitor, without limits, for the liabilities of every policyholder whose premises it chose to inspect under its contract of insurance.

McAleer and *Mustapha* do not stand alone in rejecting a direct cause of action against insurers for "negligent inspection" of policyholders' premises. Rather, these cases are consistent with a long line of well-reasoned authority from other jurisdictions, *e.g., Smith II v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 709 (Mich. 1981); *James v. New York*, 90 A.D.2d 342, 246 (N.Y. App. Div. 1982), aff'd., 457 N.E.2d 802 (N.U. 1983); and with a number of Rhode Island cases that, in related contexts, have rejected direct insurer liability to third-party claimants. *E.g., Canavan v. Lovett, Schefrin & Harnett*, 745 A.2d 173, 174-75 (R.I. 2000); *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995); *Auclair v. Nationwide Mut. Ins. Co.*, 505 A.2d 431, 431 (R.I. 1986); *see also Miller,* 146 A. at 412.[4]

In an effort to circumvent this broad body of authority, Plaintiffs invoke *Buszta v. Souther*, 232 A.2d 396 (R.I. 1967), an automobile case in which the owner of a service station was held liable to an injured party, under Restatement (Second) of Torts § 324A, for negligence in issuing an inspection sticker mandated by R.I. Stat. Title 31, Ch. 38, § 4. But *Buszta* is inapposite. It is not an insurance case. It does not address or discuss, and it has no bearing on,

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which injured parties sue insurers directly for "negligent inspection," would "constitute a radical departure from accepted principles of insurance law," *see Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 193 (La. 1997); would create a profound disincentive to insurers to engage in safety-related inspections and services, *see Smith II*, 303 N.W.2d at 721; *James*, 90 A.D.2d at 346; and would – as Plaintiffs no doubt hope – leave insurers at risk of "the well-known tendency of jurors to fail to consider the merits if a defendant ... is insured." *Miller v. Metropolitan Cas. Ins. Co.*, 146 A. 412, 414 (R.I. 1929).

[4] In some of these cases, as Plaintiffs point out, plaintiffs sought to impose tort liability on insurers for reasons other than the insurer's allegedly "negligent inspection" of policyholders' premises. *See, e.g., Auclair*, 505 A.2d at 431 (bad faith claims handling); *Canavan*, 745 A.2d at 174-75 (similar); *Cianci*, 659 A.2d at 662 (breach of contract, breach of covenant of good faith and fair dealing, breach of fiduciary duty, bad faith claims handling, intentional infliction of emotional distress). Nonetheless, these cases are consistent with *McAleer* and *Mustapha*; they illustrate the Rhode Island courts' broad recognition of the proposition that a claimant may not sue an insurer directly in tort for the insurer's allegedly wrongful acts.

the considerations applicable to inspections undertaken by insurers for risk underwriting purposes. In the almost forty years since *Buszta* was decided, no Rhode Island court has ever extended *Buszta*'s holding to impose on an insurer a duty to third parties as a result of the insurer's inspection of a policyholder's premises.[5]

Plaintiffs also rely on two older cases from Georgia, and one from Florida, which upheld a plaintiff's cause of action under Section 324A where insurers conducted repeated inspections of policyholders' premises. *See* Opp. Br., pp. 13-17 (citing *Hill v. U.S. Fid. & Guar. Co.*, 428 F.2d 112 (5th Cir. 1970); *Sims v. American Cas. Co.*, 206 S.E.2d 121 (Ga. Ct. App.), *aff'd.*, 209 S.E.2d 61 (Ga. 1974); *Universal Underwriters Ins. Co. v. Smith*, 322 S.E.2d 269 (Ga. 1984). It is questionable, at best, whether Rhode Island courts would follow the approach set forth in these cases. Even if they did, Plaintiffs' reliance on these cases is misplaced. In each of the three cited cases, the plaintiff's complaint alleged reliance by the policyholder, *Hill*, 428 F.2d at 117, *Sims*, 206 S.E.2d at 126, or by the injured third party, *Universal Underwriters*, 322 S.E.2d at 272-73. In none of the three cases did the insurer's policy contain a disclaimer of liability, like the one in the Essex Policy, which makes clear that the insurer "*do[es] not undertake to perform the duty of any person or organization to provide for the health and safety of workers or the public.*" *See* Essex Policy Conditions (emphasis supplied).

Indeed, the Fifth Circuit in *Hill* expressly *limited* its holding to cases where such policy disclaimers were absent. It suggested that future insurers "may substantially protect itself in its safety undertakings" – as Essex did here – "by making unambiguously clear to the insured either

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[5] The District Court in *McAleer*, and the First Circuit in *Mustapha*, appear simply to have ignored *Buszta*, viewing it (correctly) as irrelevant to the well-established public policy opposing imposition of direct liability on insurers.

that it can rely thereon or that it must not rely." *See* 428 F.2d at 120.[6] The single case Plaintiffs cite in which a court elected to disregard such a policy disclaimer, *Cleveland v. American Motorists Ins. Co.*, 295 S.E.2d 190 (Ga. Ct. App. 1982), has been criticized by commentators, *see* Coyne, *Effect of Exculpatory Contractual Provisions on Tort Liability to Third Parties*, 31 Tort & Ins. L.J. 785, 794 & n.43 (1996), and does not appear to reflect the better-reasoned authority on this subject.

Finally, Plaintiffs cite R.I. Stat. Ann., Title 27, Ch. 8, § 15, which limits the liability of property, casualty, and boiler and machinery insurers for negligent inspections. Plaintiffs make much of the fact that the statute appears in Title 27, Chapter 8 of the Rhode Island statutes ("Casualty Insurance Generally"). They point out that Chapter 7 ("Liability Insurance") contains no equivalent statutory provision. Plaintiffs' argument is unavailing. As Plaintiffs themselves have pointed out, "the absence of a remedy in a statutory scheme" does not affect existing, common-law remedies that may be available outside the statute. *See* Mem. Supp. Plaintiffs' Obj. to Mot. to Dismiss of Denis Larocque, et al. (Oct. 18, 2004), pp. 7-8. In the present case, Plaintiffs have set forth no evidence that the Rhode Island legislature – recognizing and codifying the public policy applicable to property, casualty, and boiler and machinery insurers – meant to abrogate the same public policy, or to permit plaintiffs to bring direct actions for "negligent inspection," against issuers of liability insurance.[7]

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[6] Decisions from other jurisdictions are in accord. *See Sherlock v. BPS Guard Services, Inc.*, 1993 WL 245980, at * 3 (D. Kan. June 29, 1993) (insurer did not undertake safety inspections to benefit insured where disclaimer in insurer's safety reports and insured's loss prevention manual made clear that the insured was solely responsible for hotel safety and security); *Leroy v. Hartford Steam Boiler Insp. Ins. Co.*, 695 F. Supp. 1120, 1126-27 (D. Kan. 1988); *Brooks v. New Jersey Manuf. Ins. Co.*, 405 A.2d 466, 468 (N.J. Super. 1979) (policy provision that stated "neither the right to make inspections nor the making thereof shall constitute an undertaking on behalf of or for the benefit of the insured or others" precluded finding that insurer undertook safety inspection to benefit others).

[7] Indeed, there is no sound public policy reason for the legislature to "refus[e] to confer inspection immunity upon liability insurers," *see* Opp. Brf., p. 5, while extending immunity to fire and casualty insurers. Plaintiffs argue that "an issuer of fire or casualty insurance is concerned about risk to its insured's business and physical property,"

II. Plaintiffs Have Failed to Assert, And Cannot Assert, Facts Necessary For Their Section 324A(c) Claim.

Alternatively, even if the Rhode Island courts were to recognize a cause of action against an insurer for "negligent inspection" of policyholders' premises under Section 324A – which they currently do not – Plaintiffs' theory would fail for a second, separate, and independently sufficient reason: Plaintiffs' inability to plead the facts necessary to show reliance on the allegedly negligent "undertaking" in this case. Reliance is, of course, an essential element of a claim under Section 324A. *See* Restatement (Second), § 324A(c), cmt. e. Plaintiffs' Opposition does not seriously contend otherwise. *See* Opp. Brf., p. 6 (citing *Dixon v. Royal Cab, Inc.*, 1988 WL 1045146 (R.I. Super. 1988)).

Here, even if Section 324A(c) is viewed to impose a voluntary duty on Essex, Plaintiffs have not pleaded, and cannot credibly plead, that the patrons who attended The Station on February 20, 2003 did so in "reliance" upon the inspection that Essex allegedly conducted in October 2002. In fact, as Plaintiffs appear to concede, those patrons were wholly unaware of Essex, the Essex policies, and the inspection on which Plaintiffs now base their theory of "voluntary undertaking." *See* Opp. Brf., p. 16.

Plaintiffs' response – citing yet another Georgia case – is to suggest that liability may be imposed so long as The Station's owner, *Mr. Derderian*, relied on the contents of the Essex inspection report. Opp. Brf., p. 17 n. 16 (*citing Huggins v. Aetna Cas. & Sur. Co.*, 264 S.E.2d

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and that it does not "attempt to foresee ... hazards to third parties." *Id.* That assertion is questionable, at best. For one thing, Plaintiffs overstate the distinction between casualty insurance, on the one hand, and liability insurance, under Rhode Island law. *See* R.I. Stat. Ann., Title 27, Ch. 2.4, § 9 (licensing provision, allowing Insurance Commissioner to license insurers to provide "casualty insurance coverage against legal liability, including ... death, injury or disability or damage to real or personal property"). For another thing, it is difficult to see the basis for Plaintiffs' view, Opp. Brf., p. 5, that a casualty insurer – inspecting a the premises of, say, a nightclub, to determine, say, the risk of fire – cannot reasonably be expected to "foresee ... hazards to third parties" if a fire occurs; while (in Plaintiffs' view) a liability insurer can and does foresee such hazards.

191 (Ga. 1980)). However, Plaintiffs have not pleaded that Mr. Derderian relied on the report. In any event, any theory of reliance by Mr. Derderian is foreclosed by the Essex Policy Conditions, which state clearly (1) that inspections or surveys conducted by Essex "relate *only* to insurability and the premiums to be charged;" (2) that Essex "do[es] not make safety inspections;" and (3) that Essex "*do[es] not undertake to perform the duty of any person or organization to provide for the health and safety of... the public.*" *See* Essex Policy Conditions (emphasis supplied). *See also Sherlock*, 1993 WL 245980, at * 3; *Brooks*, 405 A.2d at 468.

Plaintiffs express the vague hope that "discovery will flesh out" some evidence of reliance by Mr. Derderian, Opp. Br. p. 10 n. 17. But a court, ruling on a Rule 12(b)(6) motion, is not required to accept "bald assertions, subjective characterizations and legal conclusions," *DM Research, Inc. v. College of American Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999), or "conclusory descriptions of a general scenario which could be dominated by unpleaded facts." *Judge v. Lowell*, 160 F.3d 67, 77 (1st Cir. 1998), *rev'd on other grounds*, 367 F.3d 611 (1st Cir. 2004)) (citations omitted). Regardless of what Plaintiffs expect discovery to "flesh out," the plain language of the Essex Policy is fatal to Plaintiffs' Section 324A(c) theory.

III. Because Applicable Authority Is Clear, This Is Not An Appropriate Case For Certification To The Rhode Island Supreme Court.

Plaintiffs conclude their brief with an "optional" request for certification under R.I. Supreme Court Rule 6. The Rule permits certification of questions of Rhode Island law which may be determinative of a cause of action and as to which there is no controlling precedent. *56 Associates v. Frieband*, 89 F. Supp. 2d 189, 191 (D.R.I. 2000). However, "[t]he mere fact that the Rhode Island Supreme Court has not had occasion to address an issue does not, by itself, require certification." *Id.* (declining to certify question whether fire insurer is barred by "Sutton

Doctrine" from seeking recovery for fire damage caused by tenant's alleged negligence). Even where certification is available, it is "inappropriate ... to use such a procedure when the course state courts would take is reasonably clear," *id.* (citing *Bi-Rite Enterprises v. Bruce Miner Co., Inc.,* 757 F.2d 440, 443 n. 3 (1st Cir.1985)) – a determination that may be based either on existing state law, or on the "better reasoned authorities" from other jurisdictions. *Id.* (citing *Lieberman-Sack v. HCHP-NE,* 882 F.Supp. 249, 254 (D.R.I.1995)).

In the present case, *both* state law and the "better reasoned authorities" from other jurisdictions suggest that Rhode Island does not recognize a direct claim against Essex for "negligent inspection." Plaintiffs' theory, if adopted, would be inconsistent with prior case law in this district, and would create new duties that are inconsistent with the fundamental premises of the insurer-insured relationship. *See* Essex Mem. Supp. Mot. to Dismiss, pp. 12-14. This is not an appropriate case for certification. As respects Essex, the Master Complaint should be dismissed.

Respectfully submitted,

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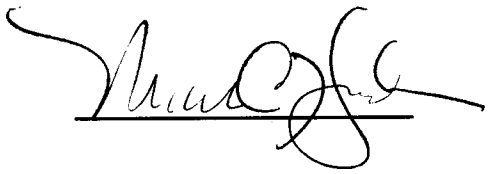
Dated: November 4, 2004

CERTIFICATION

I certify that on the 4th day of November, 2004, I served a true copy of the within document, REPLY MEMO, via first class mail, postage pre-paid, or by electronic mail to the parties listed below.



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